

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 25, 2006 Session

ESTATE OF IRENE C. DOOLEY, ET AL. v. RENEE HICKMAN

**Appeal from the Chancery Court for Rhea County
No. 1531P Jeffrey F. Stewart, Chancellor**

No. E2005-02322-COA-R3-CV - FILED AUGUST 29, 2006

Following the death of Irene C. Dooley (“the decedent”), the co-executors of her estate filed this petition against the decedent’s attorney in fact, Renee Hickman (“the respondent”). The estate’s petition seeks an accounting for all monies received by the respondent from the decedent’s accounts and the reimbursement of any money found to have been wrongfully received by the respondent. Particularly at issue is a \$21,000 check written by the respondent on the decedent’s account and cashed by the respondent for her personal benefit. The respondent claims that the decedent instructed her to write the check and to take the money as payment for her services. The trial court ruled that the Dead Man’s Statute (“the Statute”) precluded the respondent from testifying with respect to this alleged conversation with the decedent. At the hearing below, the estate called the respondent as a witness and inquired into what was done with the proceeds of the \$21,000 check. After answering the estate’s questions on the subject, the respondent raised an objection, arguing, as she does on this appeal, that the estate waived the application of the Statute by calling her as a witness and by specifically soliciting testimony regarding the disposition of the proceeds from the \$21,000 check. The trial court held that the limited scope of the estate’s questioning did not constitute a waiver of the restrictions of the Statute. In its judgment, the trial court ordered the respondent to reimburse the estate for the \$21,000. The respondent appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

J. Arnold Fitzgerald, Dayton, Tennessee, for the appellant, Renee Hickman.

William G. McPheeters, Dayton, Tennessee, for the appellees, Estate of Irene C. Dooley, Wayne Copeland and William G. McPheeters.

OPINION

I.

The decedent died of congestive heart failure on April 19, 2003. She was 95 years old. She had little formal education. She was employed for the majority of her life. She was frugal during her lifetime, and, as a consequence of this, she amassed a gross estate of some \$697,867. The decedent died testate, leaving \$1,000 to each of her three great-grandchildren with the remainder of her estate going to her grandson, Wayne Copeland. The decedent's will designated Copeland and William G. McPheeters, the estate's counsel on this appeal, as co-executors of her estate.

The respondent was a friend and neighbor of the decedent. During the year and a half preceding the decedent's death, the respondent spent many hours assisting and caring for her. According to the respondent, she generally "did everything that [the decedent] wanted [her] to do." She cooked the decedent's meals, cleaned the decedent's house, and purchased groceries and other household supplies for the decedent. She also took the decedent to doctor appointments and to restaurants.

On April 15, 2003, *i.e.*, four days before her death, the decedent executed a power of attorney, naming the respondent her attorney in fact. The power of attorney was both a general durable power of attorney and a durable power of attorney for healthcare purposes. The document was prepared by an attorney and executed in the presence of the preparing attorney and at least two other witnesses. One of the witnesses who signed the document was the respondent's husband.

On April 17, 2003, the respondent, using the authority granted to her by the power of attorney, wrote a \$21,000 check on one of the decedent's bank accounts. The check was made payable to cash. The respondent cashed the check and applied the cash for her personal use. The respondent insists that the decedent gave her this money as a way of paying her for her services over the years.

On or about April 19, 2003, the day of the decedent's death, the respondent wrote four more checks on the decedent's bank accounts. Two checks, one for \$362.17 and one for \$631.43, were made payable to Wal-Mart. The respondent testified that these checks were used to purchase household items for the decedent (*e.g.* sheets, towels, and bedding). The other two checks, one for \$2,561.89 and one for \$3,700, were made payable to Sears. The respondent testified that the \$3,700 check was used to order a central heat and air unit for the decedent, and that the \$2,561.89 check was used to order a refrigerator and stove for the decedent. The respondent cancelled the two Sears' orders after the decedent's death. She testified that she redeemed and kept the money that was intended to pay for these orders.

On July 8, 2003, the estate filed this petition against the respondent, seeking a full and complete accounting of all monies received by the respondent from the decedent's accounts. The petition also requests that the trial court require the respondent to reimburse the estate for any money found to have been wrongfully received by the respondent. The respondent subsequently filed a \$25,000 claim against the estate, alleging that this amount was due as payment for over 1,000 hours

of services provided to the decedent. The respondent's claim noted the payment of the \$21,000 as a credit, leaving the unpaid balance on her claim at \$4,000. The estate thereafter filed a motion in limine, requesting the exclusion of any evidence barred by the Statute.

The trial court held a hearing in which the principal issues were (1) whether the decedent had the requisite capacity to execute the power of attorney four days before her death; and (2) whether the respondent breached her fiduciary duty by keeping certain monies from the decedent's accounts for her personal use and benefit. Before hearing testimony, the trial court addressed the estate's motion in limine, finding that the application of the Statute was appropriate under the circumstances. The parties were therefore barred from testifying to transactions with and statements by the decedent. *See* Tenn. Code Ann. § 24-1-203 (2000).

The estate called the respondent to the witness stand. As pertinent to this appeal, the estate initiated the following line of questioning:

Q: . . . Now, on April 17th you wrote a check for \$21,000 at the bank, and you've heard the bankers testify about these. What did you do with the \$21,000?

A: I spent it.

Q: You kept that as your own personal money?

A: Yes.

Shortly thereafter, the respondent raised an objection, arguing that the estate had waived the application of the Statute by calling the respondent as a witness and by specifically asking the respondent about the \$21,000 check. The trial court overruled the objection, finding that the mere calling of the respondent as an opposing party witness did not negate the application of the Statute, and that the estate's questions regarding the \$21,000 check did not constitute a waiver because the questions did not solicit information regarding conversations with the decedent or the transaction between the decedent and the respondent. Before the conclusion of the hearing, the respondent made an offer of proof, testifying that it was at the decedent's desire and instruction that she withdrew the \$21,000 as payment for the services that she had provided to the decedent.

The trial court ultimately concluded that the estate failed to carry its burden of proof with respect to its position that the decedent lacked the legal capacity necessary to execute the power of attorney. The trial court did find, however, that the respondent violated her fiduciary duty against self-dealing by using the authority of the power of attorney to "pay herself a sum of money in the amount of \$21,000." The trial court held that the respondent owed the estate \$27,261, an amount derived by adding to the \$21,000 figure, the \$3,700 that was intended for the central heat and air unit, and the \$2,561 that was intended for the new refrigerator and stove. The trial court also found that the evidence suggested that the decedent and the respondent had an implied contract for services

and awarded the respondent \$8,000 on the claim that she was due payment for her services. Consequently, the respondent received an \$8,000 credit against the \$27,261 she owed to the estate, leaving a balance of \$19,261. This appeal followed.

II.

The respondent's sole issue on appeal is whether the trial court erred by refusing to hold that the estate waived the application of the Statute by calling her as a witness and by questioning her about the \$21,000 check. The estate raises the following additional issues: (1) whether the decedent was mentally or physically capable of executing the power of attorney; and (2) whether the respondent had the "authority to use her power-of-attorney to 'pay' herself or to write checks for her personal benefit on [the decedent]'s bank accounts." We will address each issue in turn.

III.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us burdened with a presumption of correctness as to the trial court's factual determinations – a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no such presumption of correctness attaching to the trial court's conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996).

Decisions regarding the admissibility of evidence rest within the sound discretion of the trial court. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992). Upon review of a trial court's decision to admit or exclude evidence, we recognize that "trial courts are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion." *Id.* "The abuse of discretion standard requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives." *Crowe v. First Am. Nat'l Bank*, No. W2001-00800-COA-R3-CV, 2001 WL 1683710, at *9 (Tenn. Ct. App. W.S., filed December 10, 2001) (citing *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000)).

IV.

The respondent contends that the trial court erred by failing to hold that the estate waived the application of the Statute and that, because of this error, she was prohibited from testifying about relevant declarations and conduct of the decedent. The Statute, Tenn. Code Ann. § 24-1-203, provides, in pertinent part, as follows:

In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any

transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. . . .

It has been said that the purpose of the Statute is “to prevent the surviving party from having the benefit of his own testimony, when, by the death of his adversary, his representative was deprived of his executor’s version of the transaction or statement.” *McDonald v. Allen*, 67 Tenn. 446, 448 (1874). Because the Statute may operate to exclude accurate evidence, it is “strictly construed as against the exclusion of the testimony and in favor of its admission.” *Haynes v. Cumberland Builders, Inc.*, 546 S.W.2d 228, 231 (Tenn. Ct. App. 1976). Thus, we must interpret the Statute literally. See *id.* at 230-31; Neil P. Cohen, Sarah Y. Sheppard & Donald F. Paine, Tennessee Law of Evidence § 6.01[5][c] (5th ed. 2005).

The Statute is clearly implicated by the facts of the instant case. This is an action by the estate against the respondent in which “judgments may be rendered for or against [the estate].” Tenn. Code Ann. § 24-1-203. The testimony which the respondent seeks to have introduced is that the decedent instructed her to write the \$21,000 check and take the money as payment for her services. Such testimony, clearly being offered against the estate, qualifies as testimony “as to a[] transaction with or statement by” the decedent. *Id.*

The Statute specifically provides that neither party will be allowed to testify to transactions with or statements by the decedent “unless called to testify *thereto* by the opposite party.” *Id.* (Emphasis added). It is this clause that the respondent bases her argument upon. She asserts that once the estate, *i.e.*, the opposite party, called her as a witness and inquired into the \$21,000 check, the application of the Statute was voided and she, therefore, should have been allowed to testify about how she obtained the \$21,000. However, the respondent overlooks the word “thereto” in the clause. “Thereto” refers the reader back to the barred testimony, *i.e.*, testimony pertaining to transactions with and statements by the decedent. Thus, the literal interpretation of this clause provides that the Statute will be waived when the opposite party calls the witness to testify to transactions and statements which are otherwise barred by the application of the Statute. See *Smith v. Bacon*, No. 03A01-9409-CH-00331, 1995 WL 322155, at *3-*4 (Tenn. Ct. App. E.S., filed June 1, 1995) (noting that the Statute was waived by the opposite party calling the witness and eliciting testimony pertaining to statements made by the decedent); *Burchett v. Stephens*, 794 S.W.2d 745, 749-50 (Tenn. Ct. App. 1990) (holding that the Statute was waived where the plaintiff executor called the defendant debtor to testify about the loan from the deceased creditor); *Cotton v. Estate of Roberts*, 337 S.W.2d 776, 778-79 (Tenn. Ct. App. 1960) (noting that the administrator of the estate could not object to the claimant’s testimony regarding conversations with the decedent where the administrator had first elicited the testimony).

Corpus Juris Secundum, vol. 98, *Witnesses*, § 290, sets forth further clarification with respect to when the opposite party’s calling of a witness will remove the application of the Statute. It provides as follows:

The disqualification of an interested witness to testify in his or her own behalf is removed where he or she is called by the protected party and interrogated as to his or her *communications or transactions with the decedent*. . . .

Where an interested witness is called by the protected party and interrogated as to *transactions or communications with the decedent* or other matters as to which the witness is incompetent to testify in his or her own behalf, the witness's disqualification is removed and he or she becomes competent to testify as to matters concerning which he or she has been so interrogated. Thus, the protection of a dead man's statute is waived and the door opened to such testimony, where the estate's representative elicits prohibited testimony from an interested party.

(Emphasis added and footnotes omitted).

The estate introduced the \$21,000 check into evidence during the earlier testimony of an employee of one of the decedent's banks. Therefore, the check was a part of the record when the respondent took the stand. The estate's counsel asked, "Now, on April 17th you wrote a check for \$21,000 at the bank, What did you do with the \$21,000?" The respondent replied that she "spent it." The estate's counsel then asked, "You kept that as your own personal money?" The respondent answered, "Yes." Had the estate elicited answers from the respondent as to why and how she obtained the \$21,000 from the decedent, the Statute would have been waived with respect to the testimony that the respondent seeks to introduce. However, the questions posed by the estate carefully limited the inquiry to what the respondent did with the \$21,000. The estate's questions did not attempt to elicit answers pertaining to the respondent's transactions and communications with the decedent. As succinctly stated by the trial court,

[i]n this particular case [the estate's counsel] has called [the respondent] not to testify to the transaction but to testify about facts other than the transaction, and most notably about what was done with the proceeds of the check – the checks,¹ rather. And [the respondent] has explained to us what she used the checks for. . . . But as to the transactions concerning the making or issuing of these checks, I don't think he's waived his objection and I think the statute indicates that it would have to be calling the person to testify *thereto*.

(Emphasis and footnote added). We agree that the estate did not waive the application of the Statute by its calling and questioning of the respondent. The exclusion of the respondent's testimony

¹The estate's counsel also questioned the respondent with respect to what she purchased with the two checks made payable to Wal-Mart and the two checks made payable to Sears.

regarding transactions and communications with the decedent was properly within the discretion of the trial court. Accordingly, we affirm the trial court's decision on this issue.

V.

The estate raises the issue of whether the decedent possessed the requisite capacity to execute the power of attorney. It cites the decedent's advanced age, her physical illness, and the fact that she was taking "mind altering" medications as grounds for its argument that she lacked the capacity to execute the document.

The mental capacity required to execute a power of attorney equates to the mental capacity required to enter into a contract. See *In re Armster*, No. M2000-00776-COA-R3-CV, 2001 WL 1285904, at *7 (Tenn. Ct. App. M.S., filed October 25, 2001) ("The mental capacity required to execute a general durable power of attorney, . . . [is] essentially the same and equate[s] to the mental capacity required to enter into a contract."); see also *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 297 n. 1 (Tenn. Ct. App. 2001) (noting that "to have an agency relationship under a power of attorney, the principal must have the capacity to contract."). This Court has summarized the capacity necessary to contract as follows:

Competency to contract does not require an ability to act with judgment and discretion. All that is required is that the contracting party reasonably knew and understood the nature, extent, character, and effect of the transaction. Thus, persons will be excused from their contractual obligations on the ground of incompetency only when (1) they are unable to understand in a reasonable manner the nature and consequences of the transaction or (2) when they are unable to act in a reasonable manner in relation to the transaction, and the other party has reason to know of their condition.

All adults are presumed to be competent enough to enter into contracts. . . . It is not enough to prove that a person was depressed or had senile dementia. To prove mental incapacity, the person with the burden of proof must establish, in light of all the surrounding facts and circumstances, that the cognitive impairment or disease rendered the contracting party incompetent to engage in the transaction at issue according to the standards set forth above.

Rawlings, 78 S.W.3d at 297 (internal citations and footnotes omitted). The party attempting to invalidate the power of attorney on the basis that the principal lacked the capacity to execute the document "bears the burden of proof," and "[that] proof must be clear, cogent, and convincing." *In re Armster*, 2001 WL 1285904, at *8 (citations omitted). The trial court held that the estate failed to carry this burden. We find no error in this holding.

We begin our examination of the proof on this issue with the testimony of Gary Fritts, the attorney that prepared the power of attorney and witnessed its execution. Fritts testified that the decedent instructed him to prepare the document approximately two months before its actual execution on April 15, 2003. He stated that the decedent requested that he take the document to her on a number of previous occasions, but that, for various reasons, he was unable to meet with the decedent on those occasions.

On April 15, 2003, the respondent called Fritts and told him that the decedent had suffered a stroke and wanted to “get this done.” Fritts told the respondent that she would first need to get the decedent’s treating physician, Dr. Bovine, to examine her and make sure that she was competent to sign the power of attorney. The respondent later called Fritts to tell him that Dr. Bovine was at the decedent’s home and that, according to Dr. Bovine, it was okay for the decedent to sign the power of attorney.

When Fritts arrived at the decedent’s home later that evening, he observed the decedent sitting up in her bed. She was alert and conversing with three different people in the room. Fritts stated that the decedent told him that she wanted to get the power of attorney signed that day. He also stated that the decedent knew the individuals that were present in her home and that she did not appear to expect to die in the immediate future. Fritts then read and explained the power of attorney to the decedent. He noted that he did not explain every legal term in the document but that he explained most terms. He also stated that he explained, in general terms, that the document would give the respondent the authority to act in all forms and capacities for the decedent. Fritts testified that the decedent responded by stating that she trusted the respondent and “want[ed] her to do everything.” As to the actual signing of the document, Fritts testified that, due to weakness in one of the decedent’s arms, she requested the placement of a pillow under that arm. The decedent then signed the power of attorney.

Dr. Bovine’s testimony is, of course, crucial to any discussion of the decedent’s mental capacity. In his deposition, Dr. Bovine testified that, on April 15, 2003, he visited and examined the decedent at her home. On that day, he diagnosed the decedent with having had a mild stroke. He noted that the decedent had little use of her left arm. He also noted that she had an “irregular heart” and that she looked weak. Dr. Bovine prescribed the decedent morphine to relieve pain, and stated that, to his knowledge, the decedent was not taking any other prescribed medications at that time.

Dr. Bovine stated that the decedent, at 95 years old, was “dying.” However, at no point in his deposition did he express an opinion as to her capacity to sign the power of attorney. Furthermore, he testified that he spoke with the decedent about the possibility of admitting her to a hospital to have additional tests administered. He did not order the additional evaluation because the decedent told him that she did not want to pursue his suggestion. Thus, one can argue, as pointed out by the trial court, that Dr. Bovine must have felt that the decedent was *capable* of making that decision for herself.

The trial court concluded that, though the decedent was sick and in the late stages of life, “she was lucid enough to understand the nature and extent of [signing the power of attorney].” We find no “clear, cogent, and convincing evidence” to support the estate’s argument that the decedent lacked the requisite capacity to execute the power of attorney. *See In re Armster*, 2001 WL 1285904, at *8. Accordingly, the evidence does not preponderate against the trial court’s finding on this issue.

VI.

In arguing that the decedent lacked the capacity to execute the power of attorney, the estate also asserts that, even if the decedent is found to have been competent to sign the power of attorney, “the ugly heads of undue influence and (moral) duress come into play.” As far as we can ascertain from the record, the issues of undue influence and duress were not raised or addressed below. It is well-settled that issues not raised at the trial court level may not be raised for the first time on appeal. *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991). We therefore decline to address the undue influence or duress issues any further.

VII.

The final issue raised by the estate’s brief is whether the respondent “had the power and/or authority to use her power-of-attorney to ‘pay’ herself or to write checks for her personal benefit.” The trial court’s finding that the respondent breached her fiduciary duty by “pay[ing] herself” the \$21,000 and the order that she reimburse the \$21,000, along with the \$3,700 and \$2,561 that she obtained by cancelling the Sears’ orders, renders this issue moot.

VIII.

The judgment of the trial court is affirmed and this matter is remanded to the trial court for such further action as may be necessary and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Renee Hickman.

CHARLES D. SUSANO, JR., JUDGE